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No. 91-356

In the Supreme Court of the United States

OCTOBER TERM, 1991

MEAD CORPORATION, PETITIONER

v.

B.E. TILLEY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD FARBER
ROBERT W. METZLER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

CAROL CONNOR FLOWE
General Counsel

JEFFREY B. COHEN
Deputy General Counsel

DEBORAH WEST
Assistant General Counsel

MARC A. TENENBAUM
Attorney

Pension Benefit Guaranty Corporation
Washington, D.C. 20006

QUESTION PRESENTED

Whether the court of appeals correctly held that the terms of the pension plan terminated by petitioner in 1983 required payment of "unreduced" early retirement benefits to employees who had not fulfilled the conditions established by the plan for obtaining unreduced benefits, prior to the reversion of surplus plan assets to the employer.

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This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States.[1]

[1] The Department of the Treasury and the Pension Benefit Guaranty Corporation (PBGC) each have an interest in this case because it involves the distribution of the assets of a pension plan that has been terminated. The Treasury Department has a substantial interest in this case since the Internal Revenue Service makes determinations as to the tax-qualified status of pension plans and enforces applicable tax laws with respect to plans that fail to meet qualification requirements. Moreover, this case involves the interpretation of a regulation the Department has promulgated, 26 C.F.R. 1.401-2(b).

The PBGC, a wholly-owned government corporation that enjoys independent litigating authority, 29 U.S.C. 1302(b)(1),

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent portions of Section 4044(d)(1) of ERISA, 29 U.S.C. 1344(d)(1); Section 401(a) of the Internal Revenue Code, 26 U.S.C. 401(a); Section 301(a) of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1450-1451; and the applicable Treasury Regulation, 26 C.F.R. 1.401-2(b), are set out in the appendix to this brief.

STATEMENT

1. Respondents were employees of the Lynchburg Foundry Company, formerly a wholly-owned subsidiary of petitioner, The Mead Corporation. Pet. App. 3a, 35a-36a. Each of the five respondents was a participant in the Mead Industrial Products Salaried Retirement Plan, which was established by Mead and funded entirely by contributions from Mead. *Id.* at 36a.

The Plan provided three types of retirement benefits: a normal retirement benefit, a reduced early retirement benefit, and an unreduced or subsidized early retirement benefit. Pet. App. 36a. The requirements for unreduced early retirement benefits are the subject of this litigation. Here, in brief, are the critical elements of the three types of benefits under the Plan: (1) The normal retirement benefit was payable at

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and therefore appears in this Court through its own counsel, is responsible for operating the termination insurance program created by Title IV of the Employee Retirement Income Security Act of 1974 (ERISA). The PBGC has an interest in this case because it involves the interpretation of Section 4044(d)(1) of ERISA, 29 U.S.C. 1344(d)(1), a key provision of Title IV. This brief reflects the views of the PBGC as well as of the Treasury Department.

age 65. It was calculated under a formula that took into account the participant's earnings and years of service. *Id.* at 36a, 93a-94a (Plan Art. V. § 1). (2) In contrast, the reduced early retirement benefit was available to participants who had attained age 55. That type of benefit was equal to the amount of the normal retirement benefit, reduced by five percent for each year that the participant was under age 65. Pet. App. 36a, 92a (Plan, Art. IV, § 2), 94a (Plan Art. V, § 2(a)). (3) Finally, the unreduced early retirement benefit was available to participants who had attained age 62 and had at least 30 years of service; it was equal in amount to the normal retirement benefit. Pet. App. 36a, 94a (Plan Art. V, § 2(b)).

The Internal Revenue Code provides that a pension trust may qualify for preferential tax treatment only "if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries," for the assets of the trust to be diverted to any other use. 26 U.S.C. 401(a)(2). Section 4044(d)(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1344(d)(1), further provides that "any residual assets of a single-employer plan may be distributed to the employer if—(A) all liabilities of the plan to participants and their beneficiaries have been satisfied, * * * and (C) the plan provides for such a distribution in these circumstances." The applicable regulation provides that "[t]he term 'liabilities' * * * includes both fixed and contingent obligations to employees." 26 C.F.R. 1.401-2(b)(2). The regulation also provides that, upon satisfaction of a plan's liabilities, an employer may recover "any balance remaining in the trust which is due to erroneous actuarial computations," which are defined as "the surplus arising because actual requirements differ

from the expected requirements." 26 C.F.R. 1.401-2(b)(1). "Furthermore," the regulation states, "the trust instrument must contain a definite affirmative provision" to the effect that the employer is not permitted to recover assets from the plan except as provided by law. 26 C.F.R. 1.401-2(b)(2). Mead's Plan accordingly provided that in the event the Plan was terminated, "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan * * * shall, subject to the pertinent provisions of federal or state law, be returnable to [Mead]." Pet. App. 11a, 37a, 122a (Art. XIII, § 4(f)).

In 1983, Mead sold the Foundry and terminated the Plan. Pet. App. 36a. At that time, respondents met the requirements for the reduced early retirement benefit. *Id.* at 37a. None of them, however, qualified for an unreduced benefit: four respondents had 30 years of service but were not 62 years old, while the fifth satisfied neither the age nor the service requirement. *Ibid.* Each respondent was paid a reduced benefit in a lump sum; thus, each received the present value of his normal retirement benefit reduced by five percent for each year that the participant was under age 65. *Id.* at 4a. The payments ranged between $50,000 and $87,000; if, however, respondents had been paid unreduced benefits, each would have received, on average, $9,000 more. Mead subsequently recouped $11 million from the Plan. *Ibid.*

2. In 1984, respondents filed suit in Virginia state court, contending that Mead violated ERISA by failing to pay them the unreduced early retirement benefit. Pet. App. 4a, 37a. Mead removed the case to the United States District Court for the Western District

of Virginia, which held that respondents were not entitled to the unreduced benefit. *Id.* at 4a, 37a-38a, 55a-60a. The Fourth Circuit reversed.[2] The court relied on Section 4044(a) of ERISA, 29 U.S.C. 1344(a), which states that, upon termination of a defined benefit pension plan, the plan administrator "shall allocate the assets of the plan" to six classifications and, if assets remain after the first five categories have been satisfied, pay "all other benefits under the plan." 29 U.S.C. 1344(a)(6); Pet. App. 4a, 38a, 48a-54a.

This Court reversed, holding that Section 4044(a) is solely an allocation provision and does not create benefit entitlements. Pet. App. 38a-44a. Because the Fourth Circuit had not reached two alternative grounds advanced by respondents, the Court remanded the case to the court of appeals. The Court directed the court of appeals to determine, first, whether unreduced early retirement benefits are "accrued benefits" that become "nonforfeitable" upon termination of a pension plan under 26 U.S.C. 411(d)(3); and, second, whether unreduced early retirement benefits are "liabilities" that must be satisfied, under Section 4044(d)(1)(A) of ERISA, 29 U.S.C. 1344(d)(1)(A), before the residual assets of a pension plan are recouped by the employer. Pet. App. 43a. The Court added that "the Court of Appeals should consider the views of the PBGC and the IRS." *Ibid.*

Justice Stevens dissented. Pet. App. 45a-47a. Although he agreed that Section 4044(a)(6) does not create an entitlement to retirement benefits, he con-

[2] Shortly after the court of appeals issued that decision, a class action was filed on behalf of other participants in the Mead Plan seeking similar relief. That action is pending. See Pet. 7 n.4.

cluded that the Fourth Circuit had reached the correct result and that a remand was unnecessary. Pet. App. 45a. Justice Stevens pointed out that Section 4044(d) of ERISA provides that an employer may recoup the residual assets of a plan only after "all liabilities of the plan to participants and their beneficiaries have been satisfied." Pet. App. 45a. He noted that the Plan stated that Mead could recoup any surplus remaining "after the satisfaction of all benefit rights or contingent rights accrued under the Plan." *Ibid.* After stating that "the benefits may not be 'accrued' in the ERISA sense," Justice Stevens added that respondents' "right to payment is contingent only upon their election to retire after reaching age 62". *Id.* at 46a. Justice Stevens stated that he "would construe contingent rights or liabilities to include respondents' rights to early retirement benefits upon reaching age 62." *Id.* at 47a.

3. On remand, the Fourth Circuit again ruled in favor of respondents. Pet. App. 1a-32a. The court of appeals first held that the unreduced early retirement benefits at issue were not "accrued benefits" under ERISA. *Id.* at 6a-9a. The court then concluded that it was not required to decide whether the unreduced early retirement benefits at issue were "liabilities" that had to be satisfied, under Section 4044(d)(1)(A) before Mead could recoup the residual assets of the Plan. Pet. App. 9a. The court stated that it was reluctant to reach the statutory issue in light of what it viewed as the "mishmash of statutory provisions, regulations, legislative history, and actuarial lore" bearing on the issue. *Ibid.* The court concluded that there was no need to decide whether the statute required payment of unreduced benefits to respondents because, in the court's view, the terms of the Plan compelled payment. *Id.* at 11a.

In so holding, the court relied on Article XIII, Section 4(f), of the Plan. That provision, as we have noted, states that any surplus remaining in the Plan "due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan," may revert to the employer. See Pet. App. 122a. The court of appeals concluded that, for two reasons, that provision prohibited distribution of residual assets to Mead prior to payment of the unreduced early retirement benefits: "(1) the funds in the Plan that had been set-aside in expectation of fulfilling the unreduced early retirement benefits did not remain in the Plan 'due to actuarial error'; and (2) the benefits at issue are 'contingent rights' that must be paid prior to any reversion." Pet. App. 12a.

With respect to its first point, the court did not make reference to the applicable regulation, which speaks directly to the issue. Indeed, the regulation defines "erroneous actuarial computation" as "the surplus arising because actual requirements differ from expected requirements even though the latter were based upon previous actuarial valuations of liabilities * * * and were made by a person competent to make such determinations in accordance with reasonable assumptions," 26 C.F.R. 1.401-2(b)(1). Ignoring the regulation, the court instead stated that " '[a]ctuarial error' seems to reference computational error resulting from inaccurate statistical assumptions." Pet. App. 12a. Since the surplus remaining in the Mead Plan did not result from statistical inaccuracies, the court held that the surplus did not result from "actuarial error" within the meaning of the Plan. *Id.* at 13a.

With respect to the meaning of "contingent rights accrued under the Plan," the court concluded that the

unreduced benefits qualified as "contingent rights" because respondents would have had a right to unreduced benefits upon reaching age 62. Although the court had held that respondents' rights to unreduced benefits had not "accrued" because the respondents had not reached age 62 when the Plan was terminated, the court declined to read "accrued" in Article XIII, Section 4(f), of the Plan in light of its meaning in ERISA. The court stated that "[t]he Plan incorporates no such reference to Code § 411(a)(7)'s concept of 'accrued benefit,' nor does the Plan manifest an intent to effect such an incorporation." Pet. App. 14a. Accordingly, the court held that respondents' unreduced benefits were "contingent rights" that had to be satisfied before Mead could recoup any surplus. *Id.* at 15a.

Judge Chapman dissented. Pet. App. 16a-32a. Relying on a number of revenue rulings, he concluded that "contingent liabilities 'are the benefit credits *accrued* up to the time of termination of the trust.'" *Id.* at 21a. Since the court held that respondents' right to unreduced benefits had not accrued when the Plan was terminated, Judge Chapman concluded that the Plan was not statutorily required to pay unreduced benefits to respondents. He further concluded that the drafters of the Mead Plan intended "to borrow the definitions of 'contingent' and 'accrued'" from ERISA. *Id.* at 31a.

Relying on the applicable regulation, Judge Chapman stated that "the term 'erroneous actuarial computation' is simply shorthand for what is left over after all vested and contingent obligations created in the plan are satisfied." Pet. App. 24a. In his view, it is "self-evident that the term 'actuarial error' [as used in the Plan] is coterminous with the term 'erroneous actuarial computation' [as used in the regu-

lation], especially given the interchangeable use of the two terms by the IRS" in the regulation and revenue rulings. *Id.* at 30a.

Judge Chapman stated that his conclusions were supported by Congress's enactment of the Retirement Equity Act of 1984 (REA), even though the amendments wrought by REA do not apply in this case because the Plan was terminated prior to REA's effective date. See Pet. App. 10a n.3. In Section 301(a) of REA, Congress amended ERISA and the Internal Revenue Code to address the treatment of "retirement-type subsid[ies]"—like the unreduced benefit offered under the Mead Plan—in the event that a plan is terminated or amended to eliminate unreduced benefits. Congress provided that a participant in a pension plan is entitled to unreduced or subsidized benefits only if the participant "satisfies (either before or after the amendment [or termination of the plan]) the pre-amendment conditions for the subsidy." 26 U.S.C. 411(d)(6)(B); 29 U.S.C. 1054 (g)(2). Because respondents "claim a right to unreduced early retirement benefits, even though they can not satisfy the conditions specified in the plan"—since they stopped working for Mead before reaching age 62—Judge Chapman concluded that they would not qualify for unreduced benefits under the statutes as amended. Pet. App. 28a. Moreover, Judge Chapman continued, respondents "seek the value of the subsidy not only for pre-termination service but also for post-termination service," even though Section 301(a) of REA provides for payment of a subsidy only for service before the plan was amended or terminated. Pet. App. 28a. Since he concluded that "Congress thought it was creating a new benefit under ERISA and the Code" through Section 301(a) of REA, Pet. App.

27a-28a, Judge Chapman found additional support for his conclusion that neither the Plan nor the statute, prior to REA's enactment, required Mead to pay unreduced benefits to respondents before recouping the surplus from the Plan.

The court of appeals denied a suggestion of rehearing en banc by a six-to-five vote. Pet. App. 62a-63a.

DISCUSSION

The issue in this case is whether the court of appeals correctly construed Article XIII, Section 4(f), of the Mead Plan to require payment of unreduced early retirement benefits to respondents. In our view, the court of appeals was wrong. The court's basic error was that it concluded that the Plan provision at issue was not meant to track the relevant regulation. The court should have concluded, as did Judge Chapman, that the drafters of the Plan meant to fulfill their requirements under the statutes and the regulation, but did not intend to provide rights upon termination beyond those required by law. In light of that conclusion, the court should have determined, as did Judge Chapman, that unreduced early retirement benefits were not liabilities of the Plan that had to be paid to employees who had not fulfilled the conditions set out in the Plan for obtaining such benefits.

We do not believe, however, that review by this Court is warranted. The Retirement Equity Act of 1984 makes clear how unreduced early retirement benefits are to be treated under the statutes. A court facing a similar case arising out of a termination that occurred after July 30, 1984, will not face a "mishmash of statutory provisions, regulations, legislative history, and actuarial lore," as the court of appeals perceived the pre-1984 situation. Pet. App. 9a. In-

stead, it would understand, as Section 301(a) of REA provides, that employees are entitled to unreduced benefits that accrued prior to a plan's termination if, but only if, they ultimately fulfill the plan's requirements for obtaining unreduced benefits. In our view, a court that understands the statutory framework would likely conclude that plan language such as the language at issue here was meant to adopt the rule required by statute. The possibility that a court, in a case arising after 1984, would conclude that plan language like that in the Mead Plan provides benefits in excess of those mandated by Congress seems sufficiently unlikely to require review at this time.

1. Article XIII, Section 4(f), of the Mead Plan stated that the employer would recover "[a]ny surplus remaining in the Retirement Fund, due to actuarial error, after the satisfaction of all benefit rights or contingent rights accrued under the Plan." Pet. App. 122a. As Judge Chapman correctly stated with respect to the meaning of "actuarial error," the majority simply ignored "the term's obvious origin in Treas. Reg. § 1.401-2(b)." *Id.* at 30a. That regulation explains that a surplus due to "erroneous actuarial computations"—a phrase that does not appear in the relevant statutory provisions, but only in the regulation—is not limited to situations where it is shown that an actuary made some sort of computational error in calculating funding requirements. Rather, the regulation provides that "[a] balance due to an 'erroneous actuarial computation' is the surplus arising because actual requirements differ from expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the plan and were made by a person competent

to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding." Section 1.401-2(b) further provides that "the trust instrument must contain a definite affirmative provision" stating in effect that the employer cannot "recover any amounts other than such amounts as remain in the trust because of 'erroneous actuarial computations' after the satisfaction of all fixed and contingent obligations." Accordingly, the Mead Plan was required by the regulation to include a provision such as Article XIII, Section 4(f).

Although a pension plan may provide rights in excess of those required by law, we agree with Judge Chapman that, by referring to "actuarial error," the drafters of the Mead Plan presumably meant to incorporate the concept of "erroneous actuarial computation" set forth in the regulation. IRS's rulings interpreting Section 1.401-2(b)(2) have consistently used the phrase "actuarial error" as one synonymous with the phrase "erroneous actuarial computations." See Rev. Rul. 83-52, 1983-1 C.B. 87; Rev. Rul. 71-152, 1971-1 C.B. 127; Rev. Rul. 69-421, 1969-2 C.B. 59, 69; Rev. Rul. 65-178, 1965-2 C.B. 94, 110; Rev. Rul. 61-157, 1961-2 C.B. 67, 79; Rev. Rul. 57-163, 1957-1 C.B. 128, 138; Rev. Rul. 53-33, 1953-1 C.B. 267, 273. Other courts of appeals have correctly recognized that similar plan language was meant to track the language of the regulation, rather than provide additional rights. *International Union, UAW* v. *Dyneer Corp.*, 747 F.2d 335, 337 (6th Cir. 1984) (IRS definition used in interpreting "surplus attributable to actuarial error"); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164, 1170 (11th Cir. 1988) (IRS definition used as guide to interpreting

"actuarial error"). There is simply no reason to think that "actuarial error" was intended to have a meaning different from "erroneous actuarial computation."

The court of appeals similarly misread the language in Article XIII, Section 4(f), requiring satisfaction of the "contingent rights accrued under the Plan" before any surplus was recouped by Mead. The court of appeals recognized that this phrase was "written in light of" the regulation. Pet. App. 14a. However, the court failed to appreciate the significance of IRS's long-standing administrative construction of Section 1.401-2. Since 1953, IRS consistently has interpreted "contingent obligations" (the regulation's counterpart to the Plan term "contingent rights") as "the benefit credits accrued up to the time of the termination of the trust for employees (and their beneficiaries) who might have become entitled to benefits if the trust had been continued indefinitely." Rev. Rul. 71-152, 1971-1 C.B. 127, revoked on other grounds, Rev. Rul. 83-52, 1983-1 C.B. 87; Rev. Rul. 69-421, 1969-2 C.B. 59, 69; Rev. Rul. 65-178, 1965-2 C.B. 94, 110; Rev. Rul. 61-157, 1961-2 C.B. 67, 79; Rev. Rul. 57-163, 1957-1 C.B. 128, 138; Rev. Rul. 53-33, 1953-1 C.B. 267, 273. Since the court of appeals agreed with petitioner's claim that the unreduced early retirement benefits at issue did not constitute "accrued benefits," Pet. App. 6a-9a, it should not have treated those benefits as "contingent obligations" under Section 1.401-2 or as "contingent rights accrued" under the parallel language of the Plan. Again, it seems clear that the language of the Mead Plan was meant to fulfill the Plan's obligation under the regulation to state that recoupment by the employer was not permissible except under the circumstances provided by law, not to provide additional rights to participants in the Plan.

2. Petitioner contends, Pet. 11-23, that the decision below conflicts with the decisions of five other circuits: *May* v. *Houston Post Pension Plan*, 898 F.2d 1068 (5th Cir. 1990); *Blessitt* v. *Retirement Plan for Employees of Dixie Engine Co.*, 848 F.2d 1164 (11th Cir. 1988); *International Union, UAW* v. *Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984); *Nobers* v. *Crucible Inc., 1975 Salaried Retirement Plan*, No. 90-3463 (3d Cir. Jan. 1991) (unpublished opinion); *Washington-Baltimore Newspaper Guild Local 35* v. *Washington Star Co.*, 555 F. Supp. 257 (D.D.C. 1983), aff'd without opinion, 729 F.2d 863 (D.C. Cir. 1984); *In re C.D. Moyer Co. Trust Fund*, 441 F. Supp. 1128 (E.D. Pa. 1977), aff'd without opinion, 582 F.2d 1273 (3d Cir. 1978).

We discern no square conflict. Rather, the court of appeals in this case addressed a narrow issue: whether Mead was precluded from recouping plan assets because the terms of the Plan at issue did not provide for distribution of the Plan assets to the employer prior to the payment of unreduced early retirement benefits. Pet. App. 11a-16a. Although each of the cases cited by petitioner involved a challenge to a reversion upon termination of a pension plan, none addressed the precise issue decided in this case. In fact, only *Nobers*—which was resolved by an unpublished opinion—involved unreduced early retirement benefits.[3] And in *Nobers* the issue was whether

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[3] In *May* and *Blessitt*, employees sought to recover an unaccrued normal retirement benefit, not an unreduced early retirement benefit. Similarly, in *Dyneer Corp.*, a union sought to prevent the reversion of all surplus; the union did not rely on a provision specifically addressed to unreduced carly retirement benefits. The issues in *Washington-Baltimore Newspaper Guild Local 35* and *In re C.D. Moyer Co. Trust Fund* centered on whether a disputed amendment to a plan could be given effect.

unreduced benefits constituted "liabilities of the plan" within the meaning of Section 4044(d)(1)(A) of ERISA. In the instant case, the court of appeals left that question open and based its decision on the terms of the Plan.

We nonetheless agree that the Fourth Circuit's approach is contrary to that used by other circuits. In particular, unlike other courts, the Fourth Circuit gave little or no deference to the views of IRS and the PBGC in interpreting plan terms that satisfied requirements imposed by law. The inconsistency is most evident with respect to the court's interpretation of "actuarial error" in the Mead Plan, since the court of appeals ignored Section 1.401-2(b) and the IRS's revenue rulings applying the regulation, while other courts of appeals have deferred to IRS in interpreting plans containing the term "actuarial error." See *Dyneer Corp.*, 747 F.2d at 337; *Blessitt*, 848 F.2d at 1170.[4]

3. Although the court of appeals' analysis is flawed, we believe that review by this Court is not warranted at this time. The primary reason for our view is Congress's enactment of the Retirement Equity Act of 1984. In light of that amendment to ERISA, which addressed how unreduced benefits are to be treated in the event of plan termination or an amendment that eliminates unreduced benefits, the statutory question that the court of appeals did not address—whether the unreduced benefits were "liabilities" that the Plan had to satisfy under Section 4044(d)(1)(A) before a reversion is allowed—affects only those plans

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[4] Moreover, while *Blessitt* involved normal retirement benefits rather than unreduced benefits, the Eleventh Circuit, unlike the court in this case, correctly held that the plan did not have to provide benefits that had not been earned. 848 F.2d at 1179.

that were terminated or amended as of July 30, 1984. See Section 302(d)(1) of REA, 98 Stat. 1452. In our view, respondents are correct in suggesting, Br. in Opp. 17, that most claims based on events occurring before that date should now be time-barred.

Under REA, the statutory requirements in a case such as this are now clear: persons such as respondents would be entitled to the actuarial value of the unreduced benefits they earned prior to the termination if they eventually satisfied the conditions for obtaining the benefits. See 26 U.S.C. 411(d)(6)(B) and 29 U.S.C. 1054(g)(2); Rev. Rul. 85-6, 1985-1 C.B. 133; Pet. App. 28a. Since a pension plan's "liabilities" under the statute with respect to unreduced benefits are now clear, we think it likely that courts will construe plan language that fulfills the requirement of Section 1.401-2 as doing just that, not as granting additional rights.[5] In other words, the court of appeals in this case turned to the language of the Plan only after concluding that the requirements of the statute were unclear—indeed, that the pre-1984 situation was a "mishmash." Pet. App. 9a. It accordingly read the language of the Plan in isolation. A court addressing a case arising after July 30, 1984, would more naturally read language like that set forth in the Mead Plan in light of the pertinent legal requirements, which now have been clarified, and

[5] A pension plan could make that result clear beyond peradventure by stating that the plan provision regarding distributions upon termination is intended solely to fulfill the plan's requirements under Section 1.401-2(b), and not to grant participants any rights beyond those provided by law. The Mead Plan did not so state, but instead provided generally that Plan provisions "in conflict" with the requirements of law "shall be deemed to be null and void." Pet. App. 125a. (Art. XV, § 4).

would likely conclude that such language was intended to track the regulation.

It remains possible, even after REA, that a court might construe plan language like that of the Mead Plan to provide rights greater than those provided by statute. And such a result would be of significance if, like the court below, courts construed references to surplus resulting from "actuarial error" to mean something other than surplus resulting from an "erroneous actuarial computation," since so many plans use the terms interchangeably. See Br. of Amici Curiae American Academy of Actuaries and American Society of Pension Actuaries at 15-17. However, the Treasury Department has initiated a regulation project, and it is anticipated that the regulations resulting from this project will address the meaning of "acturial error." Those regulations are also expected to address the meaning of "contingent liabilities." Accordingly, the regulations should provide further guidance regarding the issues presented in this case.

Finally, petitioner overstates the consequences that this case has for the PBGC. According to petitioner, "[r]elying on § 4003(f) [of ERISA], plan participants who did not receive unearned early retirement subsidies in plan terminations approved by the PBGC could seek to recover those benefits directly from the agency or to require it to initiate costly proceedings to recover reverted assets from sponsoring employers." Pet. 26. Petitioner appears to believe that the PBGC might be directly liable because it issued "notices of sufficiency" with respect to the terminations. But the PBGC's notices of sufficiency applied only to the first four priority categories of benefits listed under Section 4044(a) of ERISA, and therefore did

not warrant that plan assets were sufficient to pay unreduced benefits (which would qualify, if at all, under the fifth or sixth categories). Moreover, under the procedures resulting from enactment of the Single-Employer Pension Plan Amendments Act of 1986, Tit. XI, Pub. L. No. 99-272, 100 Stat. 237, the PBGC no longer issues notices of sufficiency. And while the PBGC is authorized by Section 4003(e)(1) of ERISA, 29 U.S.C. 1303(e)(1), to bring an action to require reallocation of assets that have improperly reverted to the employer, a private litigant has no right to compel the PBGC to bring such an action. Furthermore, the six-year statute of limitations of Section 4003(f)(5)(A)(i) would bar most, if not all, such litigation. In short, review is not warranted on account of possible adverse effects of the decision below on the PBGC.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JAMES A. BRUTON
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

CHRISTOPHER J. WRIGHT
Assistant to the Solicitor General

RICHARD FARBER
ROBERT W. METZLER
Attorneys

CAROL CONNOR FLOWE
General Counsel

JEFFREY B. COHEN
Deputy General Counsel

DEBORAH WEST
Assistant General Counsel

MARC A. TENENBAUM
Attorney
Pension Benefit Guaranty Corporation

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APPENDIX

1. Section 4044(d)(1) of ERISA, 29 U.S.C. 1344(d)(1), as amended, provides in pertinent part:

> any residual assets of a single-employer plan may be distributed to the employer if—
>
> (A) all liabilities of the plan to participants and their beneficiaries have been satisfied,
>
> (B) the distribution does not contravene any provision of law, and
>
> (C) the plan provides for such a distribution in these circumstances.

2. Section 401(a) of the Internal Revenue Code, 26 U.S.C. 401(a), as amended, provides in pertinent part:

> A trust created or organized in the United States and forming part of a stock bonus, pension, or profit sharing plan of an employer for the exclusive benefit of his employees or their beneficiaries shall constitute a qualified trust under this section—
>
> * * * * *
>
> (2) if under the trust instrument it is impossible, at any time prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust, for any part of the corpus or income to be (within the taxable year or thereafter) used for, or diverted to, purposes other than for the exclusive benefit of his employees or their beneficiaries.

3. Section 301(a) of the Retirement Equity Act of 1984, Pub. L. No. 98-397, 98 Stat. 1450-1451, amended 26 U.S.C. 411(d)(6) and Section 204(g) of ERISA, 29 U.S.C. 1054(g), so that each provides in pertinent part:

> a plan amendment which has the effect of * * *
>
> > eliminating or reducing an early retirement benefit or a retirement-type subsidy (as defined in regulations) * * *
>
> with respect to benefits attributable to service before the amendment shall be treated as reducing accrued benefits. In the case of a retirement-type subsidy, the preceding sentence shall apply only with respect to a participant who satisfies (either before or after the amendment) the pre-amendment conditions for the subsidy.

4. A Treasury Regulation, 26 C.F.R. 1.401-2(b), provides in pertinent part:

> (1) The intent and purpose in Section 401(a)(2) of the phrase "prior to the satisfaction of all liabilities with respect to employees and their beneficiaries under the trust" is to permit the employer to reserve the right to recover at the termination of the trust, and only at such termination, any balance remaining in the trust which is due to erroneous actuarial computations during the previous life of the trust. A balance due to an "erroneous actuarial computation" is the surplus arising because actual requirements differ from the expected requirements even though the latter were based upon previous actuarial valuations of liabilities or determinations of costs of providing pension benefits under the

plan and were made by a person competent to make such determinations in accordance with reasonable assumptions as to mortality, interest, etc., and correct procedures relating to the method of funding.

* * * * *

(2) The term "liabilities" as used in section 401(a)(2) includes both fixed and contingent obligations to employees. * * * It must be impossible for the employer (or other non-employee) to recover any amounts other than such amounts as remain in the trust because of "erroneous actuarial computations" after the satisfaction of all fixed and contingent obligations. Furthermore, the trust instrument must contain a definite affirmative provision to this effect.

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